DROPPING THE GUILLOTINE:
METHODS OF IMPEACHING WITNESSES
GENTRY LOCKE RAKES & MOORE
LITIGATION BREAKFAST
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1. Impeachment of witnesses generally.

    a. Three common scenarios:

        i. A witness' testimony at trial contradicts his prior deposition testimony.

        ii. You have a surprise (surveillance video/material from the witness' website/prior inconsistent writing) that undermines a witness' credibility or contradicts their testimony.

        iii. You are calling an adverse witness, and would like to use her prior deposition testimony to control or limit her testimony in court.

    b. Seven basic methods of impeachment.

        i. Prior inconsistent statements;

        ii. Bias/interest/motive;

        iii. Bad character for truthfulness;

        iv. Prior convictions;

        v. Prior bad acts;

        vi. Contradictory facts; and

        vii. Treatises.

    c. General requirements.

        i. Only impeach when it will help your case.

        ii. Good faith basis for believing that the impeaching fact is true.

        iii. Raise on cross examination and/or presentation of your own evidence.

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iv. Prove up if required (*i.e.*, if the witness denies a noncollateral matter).

1. A matter is noncollateral if the cross-examining party would be entitled to prove it in support of its own case. Craig D. Johnston, *Trial Handbook for Virginia Lawyers* 237 (2007) (citing *Maynard v. Commonwealth*, 11 Va. App. 437, 399 S.E.2d 635 (1990)).

d. Some basic ground rules in Virginia.

i. "Any evidence which would tend to convince the jury that the witness's perception, memory, or narration is defective or that his or her veracity is questionable is relevant for purposes of impeachment." Charles E. Friend, *The Law of Evidence in Virginia* 128 (6th ed. 2003).

ii. Impeachment generally. A party may impeach a witness called by another party. Boyd-Graves Conference of the Virginia Bar Association, *A Guide to Evidence in Virginia* § 607(c) (2007).

iii. Impeachment of a witness with an adverse interest.

1. Va. Code § 8.01-401. **How adverse party may be examined; effect of refusal to testify.** (A) A party called to testify for another, having an adverse interest, may be examined by such other party according to the rules applicable to cross-examination.

2. This rule allows a party calling a witness with an adverse interest—that is, a personal stake in the outcome of the case—to impeach that witness. Johnston, *supra*, 252 (citing *Maxey v. Commonwealth*, 26 Va. App. 514, 495 S.E.2d 536 (1998)).

iv. Impeachment of a witness proving adverse.

1. Va. Code § 8.01-403. concerns the impeachment of a witness who "prove[s] adverse." This rule applies when your own witness begins giving unexpected adverse testimony. Johnston, *supra*, 252 (citing *Maxey v. Commonwealth*, 26 Va. App. 514, 495 S.E.2d 536 (1998)).

a. A party producing a witness shall not be allowed to impeach his or her credit by general evidence of bad character.

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b. If the witness proves adverse, the party may, by leave of the court, prove that he or she made a prior inconsistent statement.

c. But before proof of the inconsistent statement can be given:

i. the "circumstances of the supposed statement, sufficient to designate the particular occasion," must be mentioned to the witness, and

ii. the witness must be asked whether or not he or she made such a statement.

d. The court, if requested by either party, shall instruct the jury not to consider the evidence of the inconsistent statements, except for the purpose of contradicting the witness.

2. Prior inconsistent statements. This is the most common impeachment technique.

a. FRE 613. **Prior Statements of Witnesses**

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

i. Prior inconsistent statements can be collateral or noncollateral. Thomas A. Mauet, *Trial Techniques* 281 (6th ed. 2002).

ii. Fed. R. Civ. Pro. 32 governs the use of depositions in court proceedings—form of presentation, objections, *etc.*

1. "Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent

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as a witness, or for any other purpose permitted by the Federal Rules of Evidence." Fed. R. Civ. Pro. 32(a)(1).

b. Virginia law.

i. Prior oral statement.

1. Prior oral statement of witness. In examining a witness concerning a prior oral statement, the circumstances of the statement, sufficient to designate the particular occasion, must be mentioned to the witness, and the witness must be asked whether she made the statement. Boyd-Graves, *supra*, § 613(a)(i).

a. *See* Va. Code § 8.01-403, *supra*.

2. Extrinsic evidence of prior inconsistent statement.

a. Extrinsic evidence of a prior inconsistent statement is not admissible unless:

i. the witness is first afforded a chance to explain or deny the statement and the opposing party is allowed a chance to question her on it, or

ii. the interests of justice otherwise require. Boyd-Graves, *supra*, § 613(a)(ii) (2007).

b. This does not apply to admissions of a party opponent. *Id*.

c. Extrinsic evidence of a prior inconsistent statement is not admissible unless the witness denies or does not remember the prior inconsistent statement. *Id*.

d. Extrinsic evidence of collateral statements is not admissible. *Id*.

i. *But see* Friend, *supra*, at 149-50 (arguing that a party seeking to impeach with a prior inconsistent statement never has to take the witness' answer, even where the matter is collateral, if the matter was first raised on direct examination).

ii. Prior inconsistent writing.

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1. Civil cases.

    a. Va. Code § 8.01-404. Contradiction by prior inconsistent writing.

        i. A witness may be cross-examined on previous statements made in, or reduced to, writing,

            1. relative to the subject matter of the civil action,

            2. without such writing being shown to him;

        ii. But if it is intended to contradict the witness,

            1. before such contradictory proof can be given his or her attention must be called to the particular occasion on which the writing is supposed to have been made, and

            2. the witness may be asked if he or she did not make the writing, and

            3. if the witness denies making it, or does not admit its execution, it shall then be shown to him or her, and

            4. if he or she admits its genuineness, he or she shall be allowed to make his or her own explanation of it;

        iii. but it shall be competent for the court at any time during the trial to require the production of the writing for its inspection, and the court may make such use of it at trial as it may think best.

        iv. However, in an action to recover for a personal injury or wrongful death

            1. no ex parte affidavit or statement in writing other than a deposition, after due notice, of a witness and

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2. no extrajudicial recording made at any time other than simultaneously with the wrongful act or negligence at issue of the voice of such witness, or reproduction or transcript thereof, as to the facts or circumstances attending the wrongful act or neglect complained of,

3. shall be used to contradict him as a witness in the case.

v. Nothing in this section shall be construed to prohibit the use of any such ex parte affidavit or statement in an action on an insurance policy based upon a judgment recovered in a personal injury or death by wrongful act case.

2. Criminal cases.

a. Va. Code § 19.2-268.1. **Contradiction by prior inconsistent writing.**

i. A witness in a criminal case may be cross-examined as to previous statements made by him in writing or reduced into writing,

1. relative to the subject matter of the proceeding,

2. without such writing being shown to him;

ii. But if it is intended to contradict such witness by the writing,

1. his attention must, before such contradictory proof can be given, be called to the particular occasion on which the writing is supposed to have been made, and

2. he may be asked if he did not make a writing of the purport of the one to be offered to contradict him, and

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3. if he denies making it, or does not admit its execution, it shall then be shown to him, and

4. if he admits its genuineness, he shall be allowed to make his own explanation of it;

iii. It shall be competent for the court at any time during the trial to require the production of the writing for its inspection, and the court may thereupon make such use of it for the purpose of the trial as it may think best.

iii. Va. Sup. Ct. R. 4:7 governs the use of depositions at trial—form of presentation, objections, *etc.*

1. "Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness." Va. Sup. Ct. R. 4:7(a)(2).

iv. "Whenever a party seeks to introduce the transcript or record of the testimony of a witness at an earlier trial, hearing or deposition, it shall not be necessary for the reporter to be present to prove the transcript or record, provided the reporter duly certifies, in writing, the accuracy of the transcript or record." Va Code § 8.01-420.3 (2007).

c. <u>Practice pointers.</u>

i. <u>Be prepared</u>.

1. You should be able to anticipate areas in which a witness will testify inconsistently with his or her deposition.

2. Master those sections of the deposition. Have them tabbed, indexed, and handy.

ii. <u>Basic technique</u>:

1. Try to add an element of drama.

2. Simplicity is essential—you want to hold up two flashcards for the jury, one black and one white. Mauet, *supra*, 282.

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a. Impeach one fact at a time. Use short sentences. *Id*.

b. Consider using visual aids (*e.g.*, overhead with two columns, "Today" and "At Scene") as permitted. *Id*.

3. Mauet's technique:

a. *Commit* the witness to the fact stated on direct, which you plan to attack.

b. *Credit,* or build up the importance of, the impeaching statement.

i. Made under oath/earlier, when the witness' memory was fresher/*etc.*

c. *Confront* by reading pertinent sections to the witness. Ask if you have read it correctly, then stop.

d. *See* Attachment 1 for an example.

e. Be prepared. What if it doesn't work? Be ready with Plan B.

iii. Be cognizant of the evidentiary status of prior inconsistent statements.

1. A prior inconsistent statement used solely for impeachment is not hearsay. Mauet, *supra*, 281.

2. Note that a prior inconsistent statement made by a party will be an admission and can be admitted both as impeachment and substantive evidence. *Id*.

iv. Note omissions from a previous statement.

1. A witness may be impeached by proof of significant omissions from his or her testimony. The omission may concern matters in a former hearing, or matters with the witness has a duty to disclose, provided there has been a failure to disclose and the witness was interrogated on the matter. Johnston, *supra,* 236 (citing Am. Jur. 2d, *Witness* § 961).

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2. When a witness trained to make reports or keep records omits a key fact from such a record, you can use the omission as a prior inconsistent written statement—the point being, if the fact was so important now, why didn't the witness write it down then? Mauet, *supra,* 290.

a. With this technique, it is critical to build up the witness' expertise in drafting reports or records. *Id*.

b. To drive the point home, instead of asking about the omitted fact, consider having the witness read for you the key absent fact from her report, or give her a pen and ask her to circle it. *Id*.

v. Do <u>not</u>

1. Ask the witness if she "remembers"—that provides a way around the substance of the question;

2. Paraphrase;

3. Read selectively from prior statement (FRE 106); or

4. Impeach on only marginally contradictory grounds. Mauet, *supra*, 287-88.

3. <u>Bias/Interest/Motive</u>.

a. <u>No Federal Rule governs this category</u>. However, bias is always considered noncollateral. If the witness does anything other than admit the matter, you must prove it up with extrinsic evidence. Mauet, *supra*, 275.

b. <u>Virginia law</u>.

i. A witness may be impeached by a showing of bias. Boyd-Graves, *supra*, § 610.

ii. Extrinsic evidence of bias is admissible. *Id*.

iii. "Bias is any sentiment for or against a party or stake in the outcome of a case which might affect a witness' testimony." Johnston, *supra*, 244 (2007).

iv. Cross examination designed to show a witness' bias may exceed general limitations on impeachment by prior conviction. *See Scott v. Commonwealth*, 25 Va. App. 36, 486 S.E.2d 120 (1997)

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(permitting examination of misdemeanors not involving moral turpitude to show bias).

v. Bias is never collateral. Johnston, *supra*, 244 (2007).

c. Practice pointers.

i. Subtlety can be essential here. An overzealous cross runs a considerable risk of offending the jury. Carefully suggest the impeaching facts, then stop. Mauet, *supra*, 275.

ii. In cases of obvious bias, consider not even raising the issue on cross examination and saving it for the closing. *Id*. at 276

4. Bad character for truthfulness.

a. FRE 608(a). **Evidence of Character and Conduct of Witness. (a) Opinion and reputation evidence of character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

b. Virginia law.

i. Reputation Evidence. The credibility of a witness may be attacked or supported by reputation evidence, subject to these limitations:

1. The evidence must relate to character for truthfulness or untruthfulness;

2. Evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence or otherwise; and

3. Evidence is introduced that the person testifying is sufficiently familiar with the witness' reputation to make the testimony probative. Boyd-Graves, *supra*, § 608(a).

5. Prior Conviction.

a. FRE 609.

i. Very technical rule with 2 basic provisions:

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1. First, any felony conviction, and any conviction involving dishonesty or false statements, can be used to impeach the credibility of any witness. The later of conviction or release from confinement must be within 10 years.

2. Second, in certain cases, the probative value of the conviction must outweigh its prejudicial effect. This balancing test is employed where:

a. The witness is a defendant in a criminal case and the prior conviction is a felony; or

b. The conviction is more than ten years old.

ii. Prior convictions are always considered noncollateral. Mauet, *surpa*, 279.

b. Virginia law. This evidence may be admitted to impeach a witness' credibility subject to the following limitations:

i. Party in a civil case or criminal defendant.

1. The fact that a civil party or an accused previously has been convicted of a felony, or a misdemeanor involving moral turpitude, and the number of such convictions may be elicited on cross examination or, if denied, proven by extrinsic evidence. Boyd-Graves, *supra* § 609(a).

2. The nature of any crime for which the witness was convicted, except for perjury, may not be shown, nor may the details of prior convictions be elicited, except to rebut other evidence concerning prior convictions. *Id*.

ii. Other witnesses. The fact that any other witness has been convicted of a felony, or a misdemeanor involving moral turpitude, the number, and the name and nature of such conviction (but not the details) may be elicited on cross examination or, if denied, proven by extrinsic evidence. *Id*. at § 609(b).

c. Practice pointers. Get a ruling on admissibility before trial. Mauet, *supra*, 279.

6. Prior bad acts.

a. FRE 608(b). **Specific instances of conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as

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provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

i. Prior bad acts are viewed as collateral. Cross examiner must take the witness' answer and cannot prove up the bad act extrinsically. Mauet, *supra*, 280.

b. Virginia law.

i. Specific instances of conduct; extrinsic proof. Specific instances of a witness' conduct generally may not be used for the purpose of supporting or attacking credibility. Specific instances of conduct generally may not be proved by extrinsic evidence. Boyd-Graves, *supra*, § 608(b).

ii. Cross-examination of character witness. Specific instances of conduct, if probative of truthfulness, may be the subject of cross examination of a character witness as to the truthfulness of another witness. *Id*. at § 608(c).

iii. Unadjudicated perjury. Any witness may be questioned about prior specific instances of unadjudicated perjury. Extrinsic proof may not be shown. *Id*. at § 608(d).

iv. Prior false accusations in sexual assault cases. Except as otherwise provided by evidentiary principles, statutes, or rules of court, a witness in a sexual assault case may be cross-examined on prior false accusations of sexual misconduct. *Id*. at § 608(e).

c. Practice pointers. Reveal enough on cross to let the jury and witness know that you have done your homework. A smart witness will fold. Mauet, *supra*, 280.

7. Contradictory facts.

a. Prior inconsistent conduct. Most jurisdictions permit proof of conduct on a prior occasion that tends to disprove the witness' current testimony. The few Virginia cases on point appear to permit it as well. Johnston, *supra*, 243 (citing *Taylor v. Commonwealth*, 117 Va. 909, 85 S.E. 499 (1915)).

8. Treatises.

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a. FRE 803(18). **Learned treatises.** To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

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ATTACHMENT 1

First Scenario: Impeachment Based on a Prior Inconsistent Statement

Adapted from Thomas A. Mauet, *Trial Techniques* 285-85 (6th ed. 2002)

Q: Mr. Witness, you saw the two cars before they collided, is that what you're telling us?

A: Yes, I did.

Q: There's no question in your mind that you saw them before the collision?

A: No, sir.

Q: Mr. Witness, you gave a deposition in this case last year, didn't you?

A: I think so.

Q: Well, you remember you were in my offices on March 15, 2006, don't you?

A: Yes, it was about then.

Q: You knew you would be asked questions about the collision?

A: Yes.

Q: And at that deposition, Ms. Opposing Counsel, the court reporter, you, and I were all present, isn't that right?

A: Yes.

Q: Both Ms. Opposing Counsel and I asked you questions about the collision?

A: Yes.

Q: Before you answered those questions you raised your right hand and were sworn by the court reporter to tell the truth, weren't you?

A: Yes.

Q: That's the same oath you took today?

A: Yes.

Q: You did tell the truth, didn't you?

A: Of course.

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Q: After you finished testifying you had a chance to read your testimony to make sure it was accurate?

A: Yes.

Q: All of those questions and the answers you gave were in a typed booklet, called "Deposition of William Witness," right?

A: Yes.

Q: After reading it to make sure it was correct, you signed it at the end, didn't you?

A: Yes.

Q: You testified at that deposition just four months after the collision happened, right?

A: Yes.

Q: So this was all still pretty fresh in your mind, wasn't it?

A: I guess so.

Q: Mr. Witness, I'm going to read from a page of your deposition--page 18, line 12, counsel. Please follow along to make sure I read the questions and your answers right.

Q: Did you see the cars before the collision?

A: No, I didn't really notice them then.

Did I read it right?

A: Yes.

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ATTACHMENT 2
Second Scenario: Surprise

1. Plan your surprise carefully.

2. Is it worth the risk? Know what point you are trying to make.

3. Anticipate objections to an undisclosed surprise.

    a. If you disclose it, it is no longer a surprise.

    b. Note paragraph V of the Uniform Pretrial Scheduling Order ("Any exhibit or witness not so identified will not be received in evidence, except in rebuttal or for impeachment…") Get ready for an argument.

4. Treat sensitive issues sensitively. Dropping a nasty surprise on a likeable witness may alienate the jury.

5. Remember that sometimes it works.

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ATTACHMENT 3
Third Scenario: Controlling an Adverse Witness.

1. Index and tab the deposition transcript. Display your artwork conspicuously.

2. Use the deposition at the start of the examination to limit the witness or at least make them cautious.

3. Jurors generally will identify with the witness until the witness gives them a reason not to.

4. If you are going to be aggressive, hurt the credibility of the witness first. Then, as necessary, attack or limit their testimony.

5. If you are going to be aggressive, lead with heavy blows.

    a. Establish control in the mind of the witness and the jury.

    b. While the witness is disconcerted, ask other important questions.

    c. Go for tight inquiries with leading questions. One fact per question. Argue your case to the jury. You are the one testifying here, not the witness.

    d. Finish strong. Remember primacy, recency, and repetition.

6. Only do this when it helps your case.

7. If the witness is evasive:

    a. Don't interrupt—that's rude.

    b. Don't rephrase your question. Repeat the same question. Maybe ask the court reporter to read it back.

    c. Don't invoke the judge unless absolutely necessary.

    d. "Do you understand the question?"

    e. Repeat the question more and more slowly.

    f. "Yes or no: Did you…"

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